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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1957.

No. 909.

ANTHONY GIARDANO and ANTHONY LOPIPARO,
Petitioners,

v.

UNITED STATES OF AMERICA.

PETITION FOR REHEARING

Of Order Denying Petition for Writ of Certiorari.

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Of Order Denying Petition for Writ of Certiorari.

Petitioner prays that this Court grant rehearing of its order of June 2, 1958, denying the petition for writ of certiorari and that a writ of certiorari issue to review the judgment of the Court of Appeals for the Eighth Circuit in the above-entitled case as prayed for in the petition filed herein.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT.

The court, in denying certiorari, has overlooked a fundamental question of criminal law, which this court has not but should pass upon in its supervisory capacity of criminal justice.

This court has never passed upon the rights and duties of District Courts to strike irrelevant and prejudicial matters from an indictment on motion of the defense. Rule 7 (d) of the Federal Rules of Criminal Procedure authorizes such action.[1] Heretofore, this court has held that striking anything from an indictment nullifies it on the theory that after the change it is no longer the indictment of the grand jury that presented it. **Ex Parte Bain,**

1 United States v. Hood, 5 Cir., 200 F. (2d) 639, 642; United States v. New York Great A. & P. Tea Co., 5 Cir., 137 F. (2d) 459, 462.

120 U. S. 1. This court in reaching this conclusion relied upon several cases which held that an indictment could not be changed even by consent of the defendant. No case of this court has determined that changing an indictment at the request of the defense to avoid prejudicial and irrelevant matter, if pursuant to Rule 7 (d), would not nullify the indictment. As a result, the District Courts are reluctant to strike prejudicial matter from an indictment and the rule is rarely applied.

In the instant case, the indictment which charged a conspiracy to violate the income tax law contained allegations that defendants "compelled by the use of the medium of fear" various cigarette vendors to have cigarettes sold by said vendors stamped. It presents a clear case where the indictment, loaded with prejudicial matter not necessary to the charge, ought to have been amended on motion of the defense. How could the defendants receive the fair trial guaranteed by the Fifth Amendment to the United States Constitution when such an indictment is read to the jury and such matters as contained therein placed before them at great length? Even the worst offender is entitled to a trial according to the standards which American justice seeks to accord to them.

The procedure was fundamentally unfair. One may be blackened worse in the eyes of the jury by an indictment containing prejudicial matters than by newspaper comment which fatally infects that fundamental fairness essential to the very concept of justice.[2] Newspapers may or may not be read by jurors. The prejudicial matter in the instant case was not disregarded at the trial but was read to the jury during the opening statement of the prosecutor (R. 11-12) and during the court's charge (R. 150). It contained allegations that the defendants used pressure and threats in their methods of soliciting customers even

2 Stroble v. California, 343 U. S. 181, 191-192; Lisenba v. California, 314 U. S. 219, 236.

though no evidence supported these allegations. This court should grant a rehearing and outlaw the use of this type of procedure.

CONCLUSION.

For the reasons set forth above and in the petition for writ of certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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Certificate of Counsel.

We hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and the reasons urged were not heretofore sufficiently presented.

.....
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.....
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.....
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